Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

LAWRENCE EPSTEIN, *et al.*,

Petitioners,

v.

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD.
and MATSUSHITA HOLDING CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Because the issue was "outside the scope of the question presented" and was "not the basis for the decision below," this Court, in *Matsushita Electric Industrial Co., Ltd. v. Epstein*, 516 U.S. 367, 379 n.5 (1996), declined to consider petitioners' objection that full faith and credit could not be given to a Delaware class action judgment because the absent class members had been inadequately represented in Delaware. 516 U.S. at 379 n.5. Three concurring justices twice stated that this issue remained open on remand. 516 U.S. at 389, 399 (Ginsburg, J.). On remand, all four circuit judges who examined the record found inadequate representation, employing terms such as "hostile" and "subvers[ive]" representation, and "collusion" (App. 80a, 70a, 87a).

(1) Did a reconstituted panel majority err in concluding -- contrary to the decisions of this Court and every court of appeals that has considered the issue, the Restatement (Second) of Judgments, and the expressed views of three Justices in this very litigation -- that so long as a state has the functional equivalent of Rule 23, absent class members are bound by a class action judgment no matter how apparent from the record before the court that there was inadequate representation in fact?

(2) Does a class action settlement judgment accord absent class members due process when (a) there has been no inquiry into or record evidence concerning the named plaintiffs and their capacity to represent absent class members; and (b) the burden to prove inadequate representation was placed upon objectors, even though "suspicions [of collusion] abound" (App. 74a n. 17, 106a)?

(3) Despite this Court's explicit refusal to consider the issue and the separate statement by three Justices that the issue was open on remand, did this Court nonetheless oblige the court below to enforce a class action judgment that all members of that court believed was based on inadequate representation?

PARTIES TO THE PROCEEDING

The named plaintiffs in the federal class action, *Epstein, et al. v. MCA Inc., et al.*, No. 92-55675 (C.D. Cal.), are Lawrence Epstein, John Linder, and Jane Rockford (as trustee of the Michael J. Rockford Trust). Jane Rockford opted out of the Delaware class action and is not affected by the Delaware judgment, or the success or failure of this petition.

The defendants are MCA Inc., Matsushita Acquisition Corporation, Matsushita Electric Industrial Co., Ltd., Matsushita Holding Corporation, Lew Wasserman, and Sidney J. Sheinberg. All claims against MCA Inc., Lew Wasserman, and Sidney J. Sheinberg have been dismissed and those defendants are no longer parties to the action. Matsushita Acquisition Corporation no longer exists by virtue of having been merged into MCA Inc.

RULE 29.6 STATEMENT

All petitioners are individuals.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Lawrence Epstein, et al., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is printed in Appendix A at 1a to 31a, and is reported at 179 F.3d 641. The court's earlier opinion is printed in Appendix B at 32a to 95a, and reported at 126 F.3d 1235.

JURISDICTION

The court of appeals entered its judgment on June 7, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amendment XIV provides in relevant part: " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law."

28 USC § 1738 provides in relevant part: "Such Acts, records and judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have . . . in the courts of such State . . . from which they are taken."

STATEMENT OF THE CASE

1. This securities law class action arose out of respondents' takeover of MCA. Alleging violations of the Exchange Act, which are within the exclusive jurisdiction of the federal courts, 15 U.S.C. § 78aa, petitioners instituted a proceeding in a California federal district court. Once the federal complaint was filed, the district court was informed that a Delaware class action asserting only state law claims had been settled and that it purported to compromise petitioners' federal claims. 516 U.S. at 389-90 (Ginsburg, J.). Rejecting the proposed settlement as "illusionary," the vice chancellor characterized the state law claims as "at best, extremely weak," and as having "little or no value." *In re MCA, Inc. Shareholders Litig.*, 598 A.2d 687 at 694, 696 (Del. Ch. Apr. 22, 1991). He added that "the *only* claims which have any substantial merit are the claims. . . in the California federal suit that were not asserted in this Delaware action." *Id.* at 696 (emphasis supplied).

The federal district court denied petitioners' motions for class certification and partial summary judgment and ultimately dismissed the federal claims. After petitioners had filed their opening brief in the Ninth Circuit, another settlement in the then completely "dormant" (516 U.S. at 392, Ginsburg, J.) Delaware proceeding was announced. Though stating that the benefits to the class were "meager" and that "suspicions [of collusion] abound," the vice chancellor approved the settlement as an exercise of his "own business judgment in deciding whether the settlement is reasonable . . ." (citation omitted) (App. 102a-103a, 106a). There was no evidence and the vice chancellor held no hearing to determine whether, at the time they sought certification as class representatives, the plaintiffs were even members of the class, held any non-time-barred federal claims, or that they otherwise adequately represented absent class members. Similarly, there was no evidence submitted to assure conflict-free representation by class counsel. Quite to the contrary: "suspicions [of collusion] abound" (App. 74a n. 17, 106a). But the vice chancellor said that the three individual objectors had not proved collusion (App. 106a). The individual objectors were neither authorized by absent class members, nor certified by the court, to represent the absent class members.

In the Ninth Circuit , defendants offered the Delaware judgment for its preclusive effect. 28 U.S.C. § 1738. Petitioners raised three bars to preclusion: the exclusively federal nature of the claims extinguished in the state court; the lack of adequate representation in Delaware violated due process; and "our federalism" prohibited such use of moribund state litigation to preempt the class's pending federal appeal. In *Epstein v. MCA, Inc.* ("*Epstein I*"), 50 F.3d 644 (1993), the Ninth Circuit reversed the district court's dismissal on the merits, granted plaintiffs partial summary judgment on liability, and ordered class certification. The court addressed only the first of plaintiffs' arguments against

preclusion. It refused to give the Delaware judgment full faith and credit because that judgment compromised claims within exclusive federal jurisdiction. So far as relevant here, defendants petitioned for and this Court granted certiorari limited to the exclusive jurisdiction issue.

2. In *Matsushita Industrial Electric Co., Ltd. v. Epstein*, 516 U.S. 367 (1996), this Court framed the issue before it as follows:

> This case presents the question whether a federal court may withhold full faith and credit from a state-court judgment approving a class-action settlement simply because the settlement releases claims within the exclusive jurisdiction of the federal courts.

516 U.S. at 369. The Court unanimously answered that question in the negative.

Because the case was limited to that threshold question, the Court expressly declined to consider petitioners' due process objection to the preclusive effect of the Delaware judgment based upon inadequate representation:

> We need not address the due process claim, however, because it is outside the scope of the question presented in this Court. . . . While it is true that a respondent may defend a judgment on alternative grounds, we generally do not address arguments that were not the basis for the decision below. (Citations omitted.)

Id. at 379 n.5. Once again, the Court was unanimous.[1] While

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[1] Justices Stevens and Ginsburg dissented in part, on the issue whether the Supreme Court in the first instance should have construed the content of Delaware preclusion law.

three concurring justices (Ginsburg and Stevens, J.J., joined on this issue by Souter, J.) discussed the issue of adequacy of representation at length, *id.* at 389-99, they too left that issue for further consideration on remand. *Id.* at 399 (". . . this is a court of final review and not first view. . .").

3. *Epstein II.* On remand, a divided panel concluded that the Delaware judgment could not be given preclusive effect because both Delaware law and federal constitutional law prohibit enforcement of a judgment rendered in a class action proceeding in which the interests of absent class members were not adequately represented.

In an opinion for himself and Judge Wiggins, Judge Norris concluded that the issue of adequacy of representation by Delaware class counsel had not been "litigated" in Delaware; that even if it had been raised by the three appearing individual objectors, Delaware preclusion law would permit a collateral challenge by an absent class member; and finally, that in any event the due process clause required inquiry into adequacy of representation before the Delaware judgment could be given preclusive effect (App. 44-47a). Judge Norris focused at length on the inadequate representation by Delaware class counsel: "This was not merely 'inadequate' representation, it was *hostile* representation that [only] served the interests of counsel in getting a fee . . ." (emphasis supplied) (App. 80a). "Indeed, Delaware counsel's representation . . . surpassed inadequacy and sank to the *level of subversion*" (emphasis supplied) (App. 70a). In dissent, Judge O'Scannlain made no effort to defend the conduct of class counsel in Delaware. The situation suggested: ". . . dare I say, *collusive*, conduct of the Delaware class attorneys" (emphasis in the original) (App.89a). But, he said, "regrettably" (App. 83a), the Delaware court had resolved the issue, and its resolution barred any further inquiry.

4. *Epstein III*. Two days after *Epstein II* was filed, Judge Norris resigned. Respondents moved for rehearing, Judge Sidney Thomas was assigned to the panel, rehearing was granted, and the prior opinion was withdrawn on the votes of Judges O'Scannlain and Wiggins. Both judges, in different ways, believed that in *Matsushita*, despite footnote 5, this Court *implicitly* directed them to enforce the Delaware judgment. Judge Thomas dissented.

Judge O'Scannlain now concluded that although this Court's opinion "did not include an express statement that the Delaware judgment in question did not violate due process, *that conclusion was logically necessary to the Court's holding*" (emphasis supplied.) (App. 10a). He said that footnote 5 did not indicate otherwise (App. 13a-14a), and Justice Ginsburg's statement that the issue remained open was dismissed as being "part of her dissent" (App. 13a). Judge Wiggins' concurrence emphasized that, while Judge Norris had "convincingly" shown the existence of "hostile" representation by Delaware class counsel (App. 20a-21a), he now believed that this Court had sent "unmistakable signals" that "the Delaware courts likely had already conclusively resolved the due process issue" (App. 21a). He concluded that this resolution must be given full faith and credit in federal court, "irrespective of whether we agree with that determination" (App. 22a).

The court offered another -- and a far reaching proposition (App. 15a-19a). So long as the state has the functional equivalent of Rule 23, absent class members are bound by the class action judgment no matter how inadequate the class representation in fact:

> Simply put, the absent class members' due process right to adequate representation is protected not by collateral review, but by the certifying court initially, and thereafter by appeal within the state

> system and by direct review in the United States Supreme Court.[2]

(App. 16a). Since the great majority of states have copied Rule 23 or adopted its functional equivalent, this means that there can be no collateral challenge based upon inadequate representation in fact.

Judge Thomas's dissent (App. 22a-31a) said that "the actual representation provided by Delaware class counsel was inadequate for the reasons persuasively detailed in Judge Norris's opinion on remand" (App. 26a). This conclusion encompassed the determination that Delaware counsel had given the Delaware courts a "misleading and incorrect" analysis of the federal litigation claims (App. 26a). But he also focused upon the purported Delaware class representatives. There was, he noted, no "record evidence that the class representatives were even members of the class" (App. 22a). Moreover, even if they were, at "the time settlement occurred, the statute of limitations prevented the Delaware class from litigating the federal claims in any Court" (App. 25a). Such class representatives "had absolutely no incentive to obtain fair valuation of the federal claims, because of their inability to assert the claims." *Ibid.* The panel's holding, he said, constituted a "license to those who would run to a favorable and remote state court to obtain settlements premised on bargain-basement valuations of federal claims, even when those claims clearly predominate over potential state causes of action" (App. 31a).

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[2] Collateral review for constitutional sufficiency of a class action judgment is limited to a consideration of "whether the *procedures* in the prior litigation afforded the party against whom the earlier judgment is asserted a 'full and fair opportunity' to litigate the claim or issue," he said (App. 17a) (emphasis added).

REASONS FOR GRANTING THE WRIT

The court of appeals enforced a class action judgment against absent class members despite the published conclusions of four circuit judges -- employing such terms as "hostile" and "subvers[ive]" and "collusion" -- that the class received inadequate representation. This decision conflicts with the settled law of this Court and other courts of appeals. Given the increasing willingness of, particularly state, courts to settle complex national class action litigation, and, as here, the frequent presence of competing and overlapping class actions in different courts, with "global" settlements available to representatives who submit the lowest bid, appropriate determination of adequate representation is essential. The decision below will have exceptional influence, if not reviewed. This Court's guidance is needed.

I. The rule announced by the court below states an unprecedented and wrong standard for evaluating an absent class member's claim that a state court judgment is not entitled to preclusive effect because it was obtained in proceedings where he or she was not adequately represented. By focusing solely on the procedure available under a state law rather than whether there was actually "adequate representation at all times" the announced rule eviscerates this Court's settled class action jurisprudence. *In the Ninth Circuit, if the opinion below stands, adequate representation does not mean adequate representation in fact by faithful class representatives; it means no more than the bare existence of adequate procedures.* This is a fundamental error in need of this Court's correction. If absent class members are to be bound by representation, this Court's cases teach that the absent class members must receive adequate representation in fact by faithful champions, and not simply have adequate procedures available to them. Otherwise, the class action mechanism creates an intolerable risk of abuse.

(i) The conclusion reached by the court below conflicts with a vast body of law. Since *Hansberry v. Lee*, 311 U.S. 32, 43 (1940), *a collateral attack case*, it has been clear that absent class members are bound only if "they are *in fact* adequately represented." (Emphasis supplied). *See also Richards v. Jefferson County, Alabama*, 517 U.S. 793, 800-801 (1996), another collateral attack case, quoting from *Hansberry*. Adequate representation must exist "at all times." *Phillips Petroleum Co. v. Shutts*, 472 U.S. U.S. 797, 812 (1985). *See also Ortiz v. Fibreboard Corp.*, 119 S.Ct. 2295, 2315 n.24 (1999) (quoting *Shutts* "at all times" language). As Justice Ginsburg said, 516 U.S. at 395, *Shutts's* phrase "at all times" means that "the class representative's duty to represent absent class members adequately is a continuing one." From *Hansberry* through *Ortiz*, an invariable theme runs through this Court's cases: If absent members are to be bound on the basis of representation, the class representatives (plaintiffs and counsel) must in fact act as faithful champions of the interests of class.

(ii) For the court below, class members must actively monitor and intervene in the class proceeding to protect their constitutional right to adequate representation. This is directly contrary to *Shutts*. *Shutts* said that, *unlike absent defendants*, absent class members are "not required to do anything", but could "sit back and allow the litigation to run its course." 472 U.S. at 810. Not so, according to the court below. Rather, to protect their rights, absent class members must hire counsel and actively monitor and intervene in all class proceedings; otherwise they are bound.[3] Simply put,

[3] Unlike non-appearing defendants who can collaterally attack a judgment for want of *in personam* jurisdiction, absent class members cannot make such an attack even though the existence of adequate representation "at all times" is a condition necessary for the existence of state court jurisdiction sufficient to bind absent class members. *See Martin v. Wilks*, 490 U.S. 755, 765 (1989). (Generally, the law imposes no duty to intervene in order to protect one's rights.)

an absent class member is and must act like a party "at all times."

II. A judgment that violates due process is not entitled to full faith and credit in "other state and federal courts." *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 482 (1982); 516 U.S. at 388 (Ginsburg, J.). The Delaware procedures were "fundamentally flawed." 456 U.S. 480. First, the Delaware court approved a class settlement without making any inquiry into adequacy of representation. There was no record evidence of any kind that, when they sought certification as class representatives, the putative Delaware class representatives were even members of the putative class, or that they held any claims when they sought certification as class representatives, that were not barred by the statute of limitations, as Judge Thomas observed (App. 25a-27a). Second, the vice chancellor placed the burden of proof on the individual objectors in the Delaware proceeding to prove *inadequate* representation, 516 U.S. at 399, Ginsburg, J., even though he recognized that "suspicions [of collusion] abound." Respondents conceded in this Court (App. 111a) that the burden of proof on adequate representation rests upon those who would create class certification and then a class settlement, not upon objectors who have never been designated class representatives. *See also Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Moreover, the vice chancellor confused the need for proof of actual collusion with proof of inadequate representation.

III. Despite the Court's explicit statement that the issue of adequate representation would not be "address[ed]" because it was "outside of the scope of the question presented" and was "not the basis for the decision below," 516 U.S. at 379 n. 5, a panel majority, for differing reasons, believed that this language need not be taken at face value and that certain passages in this Court's opinion intimated or necessarily meant that petitioners' constitutional claims

should no longer be considered. This is profoundly alarming doctrine. Just as the lower courts must "leav[e] to this Court the prerogative of overruling its own decisions," *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), so too must they leave to this Court alone the authority to say what it has and has not decided. Retention of this Court's prerogative is vital if this Court's dispositions are to have publicly intelligible meaning, and not simply constitute a trap for litigants who have unaddressed claims. It is an especially vital aspect of this Court's settled practice of limited grants of review. And it implements this Court's role as a "court of final review and not first view," 516 U.S. at 399 (Ginsburg, J.).

POINT I. A CLASS JUDGMENT BASED UPON INADEQUATE REPRESENTATION IN FACT IS NOT ENTITLED TO FULL FAITH AND CREDIT

The court below formulated a proposition deeply at variance with settled understanding: if the state court has Rule 23 or its functional equivalent (and all do), absent class members are conclusively bound by the judgment, no matter how inadequate the representation in fact.[4]

> Simply put, the absent class members' due process right to adequate representation is protected not by collateral review, but by the certifying court

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[4] Ignoring Justice Ginsburg's analysis of Delaware law and respondents' concession in this Court, referred to by Justice Ginsburg, 516 U.S. at 399 n.11, that Delaware *would* entertain a motion under Delaware Rule 60 to challenge inadequate representation, the majority below concluded that Delaware would not permit such a challenge (App. 15a n.6). In so holding, the court cited *Prezant v. De Angelis*, 636 A.2d 915 (Del. Supr. 1994) but ignored *Prezant*'s holding that due process required record based findings about the class representatives. 516 U.S. at 397 (Ginsburg, J.). *Prezant*, in turn, influenced this Court's holdings in *Amchem Products* and *Ortiz*, as to the necessity for adequate class plaintiffs.

> initially, and thereafter by appeal within the state system and by direct review in the United States Supreme Court.

(App. 16a). Since all states satisfy this condition, there is no collateral review in any court based upon inadequate representation in fact. The court's opinion is in direct conflict with an unbroken wall of authority in this Court from *Hansberry v. Lee* on down through *Amchem Products* and *Ortiz v. Fibreboard*. These opinions make clear that the class representatives (named plaintiffs and counsel) must be faithful champions of the interests of the class, if absent members are to be bound by the conduct of their "representatives". Insistence upon this requirement is of overriding importance in the context of classes certified for settlement purposes only. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 621 (1997); *Ortiz*, 119 S.Ct. at 2316.

1. In *Hansberry v. Lee*, a collateral challenge decision, the Court said that absent class members could be bound *only* if they appeared or were "*in fact* adequately represented . . ." 311 U.S. at 43 (italics added).[5] This was described as "familiar doctrine." *Id.* at 42-43. In *Richards v. Jefferson County, Alabama*, 517 U.S. 793, this Court began its opinion

[5] The court below incorrectly treats *Hansberry v. Lee* as having focused only upon matters of procedure governing the certification and conduct of class actions (App. 16a-17a). In *Hansberry*, nothing wrong was with the state court class action procedures. Indeed, in that proceeding there had been objectors who were in a position to make all available arguments, *Hansberry*, 311 U.S. at 41-43, and the collateral challenge was sustained on the substantive ground of inadequate representation in fact, *i.e.*, conflict of interest. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. at 808 n.1. (Class representatives' interests in *Hansberry* were in conflict with the interests of parties in the second action). To the same effect are the Court's more recent decisions in *Amchem*, 521 U.S. at 625-28 and *Ortiz*, 119 S.Ct. at 2318-21. Both decisions focused upon inadequate representation in fact because of intra class conflict.

by stating that "In *Hansberry v. Lee* . . ., we held that it would violate the Due Process Clause of the Fourteenth Amendment to bind litigants to a judgment rendered in an earlier litigation to which they were not parties and *in which they were not adequately represented.*" 517 U.S. at 794 (emphasis supplied). Later, in the opinion, at 800-801, the Court expressly quoted *Hansberry*'s "in fact" language. The class representatives must "adequately represent" the class *"at all times." Shutts,* 472 U.S. at 812 (emphasis supplied), *language that the court below never mentions. See also Ortiz v. Fibreboard Corp.*, 119 S.Ct. at 2315 n.24 (quoting the *Shutts* language). In holding to the contrary, the Ninth Circuit's opinion conflicts with the unanimous view of the lower courts, including the courts of appeals.[6] As Judge Becker, for example, said in *Real Estate Title*,[7] "it would violate due process to bind an absent class member to a judgment from a proceeding in which the member was not adequately represented." Such decisions clearly establish that the question of adequate representation in fact, not just upon

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[6] *See*, for example, *Gonzales v. Cassidy*, 474 F.2d 67, 75 (5th Cir. 1973), discussed by Justice Ginsburg, 516 U.S. at 395. *See also In re "Agent Orange" Product Liab. Litig.*, 996 F.2d 1425 (2nd Cir. 1993), permitting but rejecting on the merits a due process collateral attack on a prior opt-out settlement. *Id.* at 1432-1433 *et seq.* The court said that it "is axiomatic that a class action binds absent members only so long as they were adequately represented therein." *Id.* at 1435. "[A]fter judgment has been entered and subsequently is invoked against the class, the adequacy of representation is open to examination." F. James, G. Hazard, and J. Leubsdorf, *Civil Procedure* 631 (4th ed. 1992) (citing Restatement (Second) of Judgments § 42, comments e and f). *See* 3 Newberg and Conte, *Newberg on Class Actions*, §16.25 at pp. 16-133-137 (3d ed. 1992) (collecting authorities recognizing collateral attack from virtually every circuit).

[7] *In re Real Estate Title and Settlement Services Antitrust Litigation*, 869 F.2d 760, 767 (3rd Cir.), *cert. den.*, 493 U.S. 891 (1989).

the presence of procedures for determining adequate representation, are a necessary and appropriate basis for inquiry on collateral review.[8]

Adequate representation means adequate representation, not adequate procedures; it means vigorous representation *in fact* by faithful champions of interests of the class, not simply facially adequate procedures. Otherwise, the class action mechanism then becomes a license for grave abuse. As Judge Norris, citing *Hansberry*, said, "No procedure can reliably protect an absent plaintiff who does not *in fact* have an adequate representative in court championing his cause" (emphasis supplied) (App. 56a).

2. The court below eviscerates *Shutts* in a second way. The effect of its holding is that, to protect their constitutional right to adequate representation "at all times", absent class members must actively monitor and indeed intervene in the class proceeding, otherwise they are bound however inadequate the representative in fact. Absent class members must, in short, retain counsel and monitor and intervene in every class action affecting their interests. This conclusion

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[8] The court refers to opinions from the First and Third Circuits. Nothing in their holdings or reasoning supports his far reaching proposition. In *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1991) federal plaintiffs, upon commencement of a subsequent state action, intervened in the state action and litigated these claims all the way to the Delaware Supreme Court. They were properly barred by preclusion principles from relitigating those issues in the pending federal proceeding. *Hansberry v. Lee*, *supra*. In the Third Circuit's divided holding in *Grimes v. Vitalink*, 17 F.3d 1553 (3d Cir.), *cert. den.* 513 U.S. 986 (1994), a majority there said, *id.* at 1558, that the federal litigants *conceded* that they had, in fact, previously appeared and litigated the very issue in Delaware (in which case, of course, there would be preclusion). *Grimes* at the very least "leav[es] open whether one who did not object in state court could do so in federal court." Marcus and Sherman, *Complex Litigation*, p. 103 (Supp. 1997).

directly contradicts *Shutts*. There, rejecting attempts to analogize absent class members to defendants for purposes of establishing *in personam* jurisdiction, this Court said that, unlike a defendant, an absent class plaintiff "is not required to do anything." 472 U.S. at 810. For the court below, however, if an absent class member does not "do anything" before the class action judgment is entered, he is forever barred from challenging it. Absent class members are, therefore, in a position *worse* than defendants who, if they do not appear, can make a collateral challenge to the existence of *in personam* jurisdiction.

POINT II. THE DELAWARE CLASS JUDGMENT PROCEEDING WAS FUNDAMENTALLY FLAWED

A judgment that violates due process is not entitled to full faith and credit "in other state and federal courts." *Kremer v. Chemical Construction Co.*, 456 U.S. at 482; *see also* 516 U.S. at 388 (Ginsburg, J.). Here, the procedures were "fundamentally flawed." 456 U.S. at 480. While the vice chancellor's order recited that there was adequate representation, the class notice had not listed this as an issue; and there was no evidence with respect to the adequacy of representation by class counsel or the named plaintiffs. In particular, there was no record evidence that, at the time they sought certification as class representatives, the plaintiffs were even members of the class, or that they held any federal claims that were not barred by the statute of limitations. There must be evidence of some kind in the record, *Ortiz* 119 S.Ct. at 2316, of the existence of those conditions that are indispensable to representative status. Moreover, the vice chancellor placed the burden of proof on "collusion" on the objectors, not on the proponents of class certification. The "finding" or recital of adequate representation cannot overcome the glaring evidentiary defects.[9]

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[9] "[I]t must be taken to be established that a court cannot conclude all persons interested by its mere assertion of its own power (Cont'd)

1. Much of the various opinions below focused upon the conduct of Delaware class counsel. The judges below condemned it. But, as Judge Thomas recognized, *Amchem Products* once again makes clear that the class representatives also must be adequate (App.24a-25a). This is a "constitutional fact" the existence of which is necessary if absent class members are to be bound on the basis of representation alone. No court can enforce class action judgment without making a threshold due process inquiry into what the record shows with respect to the purported class representatives. This inquiry is especially crucial when the representatives have been certified for settlement purposes only. *Amchem Products*, 521 U.S. at 621; *Ortiz*, 119 S.Ct. at 2316. The panel majority, over Judge Thomas' dissent, declined to make that inquiry. Had it done so, it would see that there is not even a scintilla of evidence that would permit an inference that, at the time they sought certification as class representatives, the putative class representatives were adequate.

(i) As Judge Thomas said, *nothing in the record before the Delaware court showed that the purported Delaware representatives were even members of the class at the time they sought certification as class representatives* (App. 22a). The Delaware judgment thus squarely conflicts with this Court's precedents, which state categorically that "a class representative must be part of the class." *Amchem Products v. Windsor*, 521 U.S. at 625-26; *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982).[10]

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. . . even where its power depends upon a fact and it finds the fact." *Chicago Life Ins. Co. v. Cherry*, 244 U.S. 25, 29 (1917).

[10] "[A]ctual, not presumed, conformance with Rule 23(a) remains, however, indispensable." *General Telephone Co. of Southwest v. Falcon*, 457 U.S. at 160. This means that, "[a] class is
(Cont'd)

(ii) Even if the Delaware representatives had been shown to be class members, it is indisputable, as Judge Thomas also noted (App. 25a), that all their individual federal claims were barred by the statute of limitations. *At the point at which these Delaware class "representatives" sought certification as class representatives, they had no claims that they could litigate -- state or federal -- in any court.*[11] The Ninth Circuit decision conflicts with *Great Rivers Co-op of SE Iowa v. Farmland Indus., Inc.* 120 F.3d 893, 899 (8th Cir. 1997), which held that class members with time barred claims could not represent the class.[12] More importantly, the

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not maintainable as a class action by virtue of its designation as such in the pleadings." *In re American Medical Systems, Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996). "To make an informed and independent judgment,. . . the court needs facts, not allegations." *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 437 (1968). Even if allegations in the complaint alone sufficed, the allegations of the Delaware complaints are insufficient. They are unverified. Moreover, the complaint alleges that the putative class representatives owned MCA shares at some point during the class period, not that they tendered their shares and, thus, potentially had rights under federal law.

[11] *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), holds that 1934 Act claims must be brought within one year of discovery. Under *American Pipe and Constr. Co. v. Utah*, 414 U.S. 538 (1974) and *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345 (1983), the statute is tolled once the complaint is filed only until the district court denies certification. The district court did so in April of 1991 and again on September 6, 1991. When the settlement was announced in October 1992, the statute had run even if September 6, the second *Epstein* certification denial, is viewed as the trigger date.

[12] Moreover, even if the Delaware plaintiffs could have asserted individual federal claims, any *class* action at this point in time would have been barred by limitations. Tolling does not extend to new class
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certification of a class represented by representatives and counsel without any litigitable claims – state or federal – "did not support the essential premises" required for certification. *Ortiz*, 119 S.Ct. at 2316. The Delaware certification order thus conflicts with this Court's decisions in *Amchem Products* and *Ortiz*, both of which require that the putative class representatives must have litigable claims, and that class counsel's relationship to the claims not be conflicted.

We submit that inadequate representation exists as a matter of law when a class representative seeks certification for the purpose of releasing claims that "the representative" has no power to assert in any court, and when the representative thus sits at the bargaining table only because defendants have for their own purposes refrained from filing a dispositive motion. As Judge Thomas observed, such "[c]lass representatives ha[ve] absolutely no incentive to obtain fair valuation of the federal claims . . . ." (App.25a).

2. The vice chancellor not only made no inquiry into adequacy of representation; instead, he placed the burden of proof on the objectors to prove *inadequate* representation. 516 U.S. 399 (Ginsburg, J.). They, of course, were not appointed to represent the absent class members and make no commitment to undertake the fiduciary duties associated with that representation. In this Court respondents conceded that the burden of proof is on those who propose class certification and settlement, not those who oppose it (App. 111a). Allocation of burden of proof surely matters where "suspicions [of collusion] abound." Respondents made no

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action claims. *See Andrews v. Orr*, 851 F.2d 146, 149 (6th Cir. 1988): "The courts of appeals that have dealt with the issue appear to be in unanimous agreement that the pendency of a previously filed class action does not toll the limitations period for additional class actions by putative members of the original asserted class."

effort – none – to assuage the vice chancellor's concerns. It is, accordingly, irrational for respondents to argue that they discharged their burden when "suspicions [of collusion]" went unaddressed. Moreover, the vice chancellor employed the wrong constitutional standard. He confused proof of adequate representation with proof of collusion. Only the former is constitutionally relevant; and, quite clearly, that can be demonstrated without proving actual collusion between the class representatives and the defendants.

POINT III. THIS COURT HAS NOT DIRECTED THE COURT BELOW TO ENFORCE A CLASS ACTION JUDGMENT SECURED BY INADEQUATE REPRESENTATION.

At oral argument, petitioners sought to demonstrate inadequacy of representation, but this Court admonished counsel not to argue "on some peripheral issues that aren't here" (App. 113a). After that interchange, it was not surprising that the Court's opinion refused to address the issue of adequacy of representation because it was "outside the scope of the question presented" and was "not the basis for the decision below." 516 U.S. at 379 n.5. Nonetheless the panel majority believed that footnote 5 need not be taken at face value. Judge Wiggins believed that this Court sent "unmistakable signals" to enforce the Delaware judgment, and Judge O'Scannlain said that it was a "logically necessary" premise of this Court's disposition in *Matsushita*. These opinions empty footnote 5 of any meaning. Far more important, they compromise the public meaning of this Court's dispositions by setting traps for litigants as to what has and what has not been decided, *sub silentio*, despite this Court's explicit reservation of the very issue; they improperly impinge upon this Court's power to make limited grants of review. And they undercut this Court's role as a court of final review, not first view, which generally means that the

Court does "not decide in the first instance issues not decided below." *NCAA v. Smith*, 119 S.Ct. 924, 930 (1999).

Footnote 5 is a *holding of this Court*, one that was necessary for the full disposition of the petition since, in principle, a respondent may defend the judgment of the court below on any ground consistent with the record. *E.g.*, *Bennett v. Spear*, 520 U.S. 154, 166 (1997) (citing *Matsushita* for this proposition and the discretionary nature of the Court's authority in this respect). Just as the lower courts must "leav[e] to this Court the prerogative of overruling its own decisions." *Shearson/American Express*, 490 U.S. at 484, so too they must leave to this Court alone the authority to say what it has decided and what it has not. This Court has repeatedly relied upon *Matsushita* for the "we do not decide" proposition.[13]

1. Judge Wiggins apparently believed that this Court had held that the Delaware chancery court had resolved conclusively the issue of adequate representation and that was binding. This is wrong factually and constitutionally. First, this Court did not make such a determination. As Judge Thomas (App. 28a-30a), echoing Judge Norris's earlier exposition (App. 42a-44a), showed, the Delaware court had not resolved the issue. Moreover, the conduct of the Delaware objectors could not conclusively bind absent class members. "Objectors are objectors, not class representatives" (App. 45a). As Judge Thomas noted, "The individual objectors who voluntarily appeared at the fairness hearing were not authorized by the absent class members to represent

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[13] *E.g.*, *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 400 n.7 (1996). In *Cass County, Minnesota v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 1911 n.5 (1998), the Court expressly relied upon footnote 5 to justify the Court's refusal to decide an issue outside the scope of the question presented and that had not been addressed by the court below.

their interests, nor *were they certified by the state to do so*" (emphasis added) (App. 30a). This fact alone is fatal to attaching conclusive legal significance to the conduct of the Delaware objectors. *Richards v. Jefferson County, Alabama,* 517 U.S. at 801 (1996) (noting that plaintiffs in prior proceedings had not been designated as class representatives and thus could not bind absent class members). Additionally, if an objector could conclusively bind all other class members, "surely no objector could accomplish what a class member could not: binding a class without satisfying due process requirements."[14]

2. Abandoning his first opinion, Judge O'Scannlain said that this Court itself had itself resolved the due process issue. The "conclusion [that the Delaware judgment satisfied due process], was logically necessary to the Court's holding" (App. 10a). This is a striking analysis; if the Court had decided the due process issue implicitly, the explicit reservation in footnote 5 is meaningless. It is, however, his logic, not this Court's perception, that is flawed. There is no inconsistency in this Court having said: Respondents in *Matsushita* advanced two reasons for not enforcing the judgment. The first reason (here, state court release of federal claims within the exclusive jurisdiction of the federal courts) is not valid. But we do not address the question whether the second reason (inadequate representation) justifies not giving full faith and credit to that judgment. We are a court of last resort. The second issue is outside the question presented, and, it was not the basis of the decision below.[15]

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[14] Monaghan, *Antisuit Injunctions And Preclusion Against Absent Non Precedent Class Members*, 98 Colum. L. Rev. 1148, 1199 (1998). "The Epstein plaintiffs were not adequately represented in the Delaware state court proceedings by either the class representatives or the objectors . . ." (App. 31a) (Thomas, J.).

[15] Judge O'Scannlain's brief reliance upon *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982) (App. 10a, 17a), to support

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Judge O'Scannlain also insists that "if the Epstein appellants' contention that the Delaware judgment is constitutionally infirm were true, *Matsushita* would be an advisory opinion" (App. 12a). This is plainly wrong. As Judge Thomas noted (App. 30a n.3), this Court conclusively resolved the statutory issue upon which it granted review. Nothing more is required to satisfy Article III. Otherwise, this Court's practice of limited grants of certiorari, as well as remands for further proceedings, are unconstitutional. The order entered by the Court, remanding for proceedings "consistent [or not inconsistent] with this opinion," 516 U.S. at 387, is fully consistent with this reasoning, and it is a recurring one. See Hart & Wechsler's, *The Federal Courts in the Federal System*, 507-508 (4th ed. 1996). That mandate leaves the court below entirely free to pass on any undetermined questions, and this frequently happens because limited grants by this Court are a commonplace. *Id.* at 487-89. That, on remand, the final judgment below might remain unaffected is quite common and always has been. See, for example, *State Tax Commission of Utah v. Van Cott*, 306 U.S. 511 *on remand*, 98 Utah 264, 96 P.2d 40 (1939).[16]

(Cont'd)
his "logically necessary" holding is mystifying. In *Kremer*, so far as relevant here, a federal court litigant challenged enforcement of a prior state court judgment because relevant state procedural law was, he alleged, "fundamentally flawed." *Id.* at *480*. Noting that a constitutionally infirm judgment cannot be given full faith and credit, *id.* at 482, this Court entertained the challenge; held that the state procedures did satisfy due process; and accordingly, it accorded full faith and credit to the state court judgment. 456 U.S. at 483-85. The challenge is to the class representative's failure to provide adequate representation "at all times". *Shutts, supra*. If that condition does not exist, the state court class action judgment violates due process and cannot be accorded full faith and credit. 516 U.S. at 388, Ginsburg, J.

[16] Later in his opinion, Judge O'Scannlain says, "We further note that where the Court leaves an issue open on remand, it often expressly
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CONCLUSION

The petition for a writ of certiorari should be granted.

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states that it is done so" (App. 14a). This is an obvious makeweight. "Often" is the key word here, otherwise the court has fashioned a novel clear statement rule: Unless magic words are used, this Court will be deemed to have set a trap for the unwary. Many decisions do not use these talismanic words, but it is apparent that issues remain open on remand. *E.g. Jefferson v. City of Tarrant, Ala.*, 118 S.Ct. 481, 483 (1997); *Pounders v. Watson*, 521 U.S. 982, 989-990 (1997); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 728-29 (1997); *General Motors Corp. v. Tracy*, 519 U.S. 278, 305 n. 13 (1991). Moreover, insistence upon a magic words approach completely empties footnote 5 of any meaning.